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No. 85-547

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

TRAVIS WARD,
Petitioner

v.

SENTRY TITLE CO., INC.,
Respondent

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

EASTLAND LAW OFFICES
HIRAM C. EASTLAND, JR.
(Counsel of Record)
Joanne E. Nitzberg
600 East Amite St.
Jackson, Mississippi
(601) 948-7545

Counsel for Petitioner

J. P. Coleman
Ackerman, Mississippi

Counsel for Petitioner

STAR GRAPHICS, INC. - (601) 981-2161 - JACKSON, MS 39206

Rohde, Chapman, Ford & How
Michael E. Rohde
Lawrence M. Wells
3500 Southland Center
400 North Olive, Box 270
Dallas, Texas

Counsel for Petitioner

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I. INTRODUCTION

On September 29, 1984, Petitioner Ward's Petition for Writ of Certiorari to the U.S. Court of Appeals for the Fifth Circuit was filed and docketed. Thereafter, on October 12, 1984, the Clerk of this Court informed Petitioner's counsel that additional background information with respect to the procedural history of the present action, as well as further explanation of the events preceding the filing of the Petition for Certiorari, would be helpful in the Court's consideration of this action.

Accordingly, Petitioner hereby files his Supplemental Brief setting forth the requested information as stated above.

II. DISCUSSION

On April 5, 1984, Petitioner Ward filed a Petition for Panel Rehearing and Suggestion for En Banc Rehearing in the Fifth Circuit Court of Appeals requesting review of the Circuit Court's decision dated March 12, 1984. The order denying these petitions was issued on June 21, 1984. (See Supplemental Appendix "A").

Importantly, prior to the date on which Petitioner's time in which to file a Petition for Writ of Certiorari to review the order of the Circuit Court dated June 21, 1984, had expired, the Texas Supreme Court issued its decision in *Ginther v. Taub*[1] which confirmed Petitioner's position as to the irreconcilable conflict between opinions within the Fifth Circuit itself and between the Circuit Court and the Texas Supreme Court on the law of constructive trusts. The *Taub* decision reaffirmed the line of controlling Texas authorities which hold that a prior fiduciary relationship directly related to the subject transaction is sufficient to support imposition of a constructive trust.[2]

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[1]27 Tex.S.Ct. J. 488 (July 11, 1984). (hereinafter referred to as *Taub*).

[2]For a graphic illustration of the undisputable fact that where a prior fiduciary relationship encompasses or is directly related to the transaction at issue it is sufficient to support imposition of a constructive trust, as well as a graphic illustration of the irreconcilable conflict of the panel decision with the line of cases cited by *Taub* and an irreconcilable conflict between the panel decision and a prior Fifth Circuit decision on the same issue, please refer to Appendix "E". See generally, Petition for Certiorari; Appendix "F" (Appellee's Suggestion for En Banc Rehearing in Light of Intervening Decision of Supreme Court of Texas.)

The intervening decision in *Taub* thus, gave rise to *further proceedings in the Circuit Court which are appealed from herein*, since the case law of the Fifth Circuit Court of Appeals clearly recognizes that subsequent state court decisions pertinent to the issues before the circuit court should be brought to the Court's attention. *Broussard v. Southern Pacific Transportation Co.*, 665 F.2d 1387, 1390 (5th Cir. 1982, rehrng en banc); *Maxey v. Freightliner Corp.*, 665 F.2d 1367, 1369, 1374 (5th Cir. 1982, rehrng en banc).

In an attempt to bring the *Taub* decision to the attention of the Circuit Court, Petitioner Ward initially filed a Motion to Stay or Recall the Mandate on July 18, 1984, to allow briefing and consideration of the impact of the *Taub* case on the panel's decision. The panel's Order denying Petitioner's request was issued on July 23, 1984. (See Supplemental Appendix "B").

Subsequently, in light of the unusual circumstances brought about by the intervening Texas Supreme Court decision and the fact that the Federal Rules of Appellate Procedure (FRAP), as well as the Fifth Circuit Court of Appeals Internal Operating Procedures, do not specifically provide for the manner and time in which subsequent state decisions should be brought before the Court, Petitioner sought guidance from the Clerk's Office of the Circuit Court. Upon informing the Clerk's Office that Petitioner was seeking to bring the subsequent state decision to the attention of the *en banc* Court, Petitioner was advised that because the Rules do not specifically provide for the time or manner of filing under circumstances such as those involved herein, the most appropriate manner in which to proceed would be to file a Motion for Leave to file a Suggestion for *en banc* Rehearing, along with the actual Suggestion for *en banc* Rehearing.[3]

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[3]In instances where a suggestion for rehearing en banc is filed without a petition for panel rehearing, the suggestion is likewise "treated as a petition for rehearing by the panel." FRAP 35, Fifth Circuit I.O.P. at page 97.

Petitioner's Motion for leave to file was summarily denied on August 30, 1984, by the Judge who wrote the majority opinion in the case and the Suggestion for *en banc* Rehearing was returned unfiled. (See Supplemental Appendix "C").

Importantly, in light of the unusual circumstances concerning the subsequent Texas Supreme Court decision related herein, Petitioner respectfully submits that the request for rehearing filed in the Circuit Court on August 21, 1984, constitutes a timely filed petition for rehearing under Supreme Court Rule 20.4 and therefore, the Order of August 30, 1984, denying Petitioner's request is the date from which Petitioner's time to file his Petition for Writ of Certiorari begins to run under that rule.[4]

Petitioner respectfully submits that a rigid application of Rule 20.4 to the circumstances of the present case would give rise to an extremely harsh result by precluding Petitioner from bringing a pertinent intervening state court decision to the attention of the Court.

Moreover, if this Honorable Court denies Petitioner the opportunity to present the merits of his request for review, Petitioner will have been denied any forum for submitting the merits of his claims of irreconcilable conflict with Texas law and with other Fifth Circuit panel decisions.[5]

Such a result would clearly render Petitioner's denial of due process asserted in the Petition for a Writ of Certiorari even more egregious.

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[4]Indeed, Petitioner would note that the August 30, 1984, Order gives rise to the very issues set forth in the Petition for a Writ of Certiorari appropriate for review by this Court. See Questions Presented for Review in the Petition.

[5]As previously stated, the briefs supporting the effect of the subsequent state decision were returned unfiled. (See Appendix "F" which also included a graphic illustration demonstrating irreconcilable conflict; see also Supplemental Appendix "C").

CONCLUSION

In the interest of promoting justice and fairness upon review, Petitioner respectfully submits that Petitioner's request for rehearing as well as Petition for a Writ of Certiorari were timely filed.

Respectfully submitted,

Hiram C. Eastland, Jr.

HIRAM C. EASTLAND
Eastland Law Office
600 E. Amite Street
Jackson, Mississippi 39202

CERTIFICATE OF SERVICE

I, Hiram C. Eastland, Jr., one of the attorneys for Petitioner herein, am a member of the bar of the Supreme Court of the United States, hereby certify that on the 26th day of October 1984, I served a true and correct copy of Petitioner's foregoing Supplement to Petition for Writ Certiorari on the several parties hereto by mailing three copies of said document by United States mail, in duly addressed envelopes, with postage prepaid, to each of the following persons:

1. J. Albert Kroemer, Esq.
   J. Michael Tibbals, Esq.
   Vetter, Bates, Tibbals, Lee & DeBusk
   2648 One Main Place
   Dallas, Texas 75250
   Attorneys for Respondent

2. Charles O. Shields, Esq.
   Shields, Blankenship, McCrory & Noble
   720 Preston State Bank Building
   Dallas, Texas 75225
   Attorney for Amicus Curiae,
   Greater Dallas Board of Realtors, Inc.

3. David Crump, Professor of Law
   South Texas College of Law
   1303 San Jacinto Street
   Houston, Texas 77002
   Attorney for Amicus Curiae,
   Texas Independent Producers and
   Royalty Owners Association.

I further certify that all parties required to be served have been served.

Hiram C. Eastland, JR.

Hiram C. Eastland, Jr.